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MEHDI DADASHI HAVADARAGH v. KETUA PENGARAH JABATAN KASTAM DIRAJA MALAYSIA & ORS

COURT OF APPEAL, PUTRAJAYA
LINTON ALBERT JCA
NALLINI PATHMANATHAN JCA
B VERNON ONG LAM KIAT JCA
[CIVIL APPEAL NO: B-01-419-12-2013]
21 JANUARY 2015

C ***CUSTOMS AND EXCISE:*** *Forfeiture – Forfeiture of monies seized – Appellant found carrying USD350,000 in cash at airport without letter of authority by Bank Negara Malaysia – Monies seized due to suspicion that appellant committed offence under s. 125 of Customs Act 1953 – Customs Department forfeited monies without informing appellant – Claim for return of monies at High Court dismissed – Appeal against decision of High Court – Whether appellant submitted written notice for* D *return seized monies within period specified under s. 128 of Customs Act 1967*

WORDS AND PHRASES: *Interpretation – Customs Act 1967, s. 128 – 'Give written notice' – Forfeiture of monies in amount of USD350,000 in cash by Customs Department – Appellant claimed to have given written notice for recovery of monies when his statement was taken in writing by senior customs officer – Whether 'give* E *written notice' should be given strict interpretation – Whether written statement recorded by senior customs officer sufficed as written claim for return of monies*

The appellant was returning to Iran from the Kuala Lumpur International Airport carrying cash in the amount of USD350,000 ('the monies'). Due to his failure to produce any letter from Bank Negara Malaysia authorising him F to take the monies out of the country, the appellant was suspected of committing an offence under s. 125 of the Customs Act 1967 ('the Act') and the monies were subsequently seized by the Customs Department. The appellant made a series of queries about the monies to the Customs Department but was informed that the matter was under consideration and G that no final decision had been made. After a period of one year and ten months, with no decision forthcoming and no information on his monies, the appellant filed a claim in the High Court seeking the return of the monies. It was only then that the appellant discovered that the monies had been automatically forfeited even though no prosecution or charge was issued H against the appellant. The High Court, in agreement with the respondents' contention that the appellant had failed to submit a written notice for the return of the seized monies within a period of one calendar month in accordance with s. 128 of the Act, dismissed the appellant's claim. Hence, the present appeal. The appellant submitted that although there was no I specific written notice issued, the appellant had claimed for the recovery of his monies when his statement was taken in writing by the senior customs officer who had seized the monies. The appellant further submitted that his

claim for monies had been made well within the period of one calendar month which was required under s. 128 of the Act. The fundamental issues that arose for the court's adjudication were: (i) whether the appellant had made a written notice for the return or release of the monies within a period stipulated under s. 128 of the Act; and (ii) whether the written statement recorded by the senior customs officer sufficed as a written claim for the return of the monies.

Held (allowing appeal)
Per Nallini Pathmanathan JCA delivering the judgment of the court:

(1) Under s. 128(1) of the Act, when any goods are seized but there is no prosecution arising from such seizure and there is no claim made in respect of those goods within one calendar month, then and only then are the goods deemed to be forfeited. Section 128(2) further stipulates that any claim to such goods is to be made in writing by a person who makes the following assertions, namely that is the owner of the goods and that the goods were not liable for forfeiture. (paras 34 & 35)

(2) An unnecessarily restrictive interpretation ought not to be accorded to the words specified in s. 128(2) namely 'give written notice'. The words are not to be construed so narrowly as to confine the section to mean that it is only satisfied when a formal notice or letter in writing is issued by the appellant to the Customs Department within the requisite time of one month. The construction adopted by the High Court would require the introduction of the additional words 'issued by the appellant' after the words 'written notice'. This would not give full accord to the section. (paras 41 & 44)

(3) There was a substantive compliance of s. 128(1) and (2) of the Act. The appellant did effectively assert that he was the owner of the monies and that he was claiming for the monies such that it ought not to be forfeited. The statement recorded by the senior customs officer who seized the monies was made in writing. The written notice was accorded to the senior customs officer within the one calendar month period stipulated under the Act. Therefore, this satisfied the requirement set out in s. 128(2) of the Act. (paras 37, 38 & 39)

(4) Since there was sufficient notice of a claim in writing by the appellant to the relevant senior customs officer, no automatic or deeming forfeiture of the monies would follow. Where the Customs Department or the respondents are aware of a claim to the monies and they have failed to initiate a prosecution within one calendar month, there can be no forfeiture or deemed forfeiture. The respondents, through the Director General of Customs, must release or refer the claim to court. (paras 48 & 51)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Ketika hendak pulang ke Iran daripada Lapangan Terbang Kuala Lumpur, perayu membawa bersama-samanya sejumlah tunai USD350,000 ('wang tersebut'). Akibat kegagalan untuk mengemukakan sebarang surat daripada Bank Negara Malaysia yang memberikannya kuasa untuk membawa wang
B tersebut keluar daripada negara, perayu disyaki melakukan satu kesalahan di bawah s. 125 Akta Kastam 1967 ('Akta') dan wang tersebut dirampas oleh Jabatan Kastam. Perayu telah membuat beberapa pertanyaan mengenai wang tersebut kepada Jabatan Kastam tetapi dia dimaklumkan bahawa hal perkara tersebut masih dalam pertimbangan dan tiada keputusan muktamad yang
C telah dibuat. Selepas tempoh satu tahun sepuluh bulan, tanpa keputusan yang kunjung tiba dan maklumat mengenai wangnya, perayu memfailkan tuntutan di Mahkamah Tinggi memohon pemulangan wang tersebut. Hanya pada masa itulah perayu mendapat tahu bahawa wang tersebut telah dilucut hak secara automatik walaupun perayu tidak didakwa atau dipertuduh.
D Mahkamah Tinggi, bersetuju dengan hujahan responden-responden bahawa perayu telah gagal mengemukakan satu notis bertulis bagi pemulangan wang yang dilucuthak tersebut dalam tempoh satu bulan kalendar selaras dengan s. 128 Akta, menolak tuntutan perayu. Oleh itu, rayuan ini. Perayu menghujahkan bahawa walaupun tiada notis khusus yang dibuat, perayu telah
E menuntut pemulangan wangnya semasa kenyataannya diambil secara bertulis oleh pegawai kanan kastam yang merampas wangnya. Perayu selanjutnya menghujahkan bahawa tuntutannya bagi wang tersebut telah dibuat dalam tempoh satu bulan kalendar seperti yang diperuntukkan di bawah s. 128 Akta. Isu-isu penting yang berbangkit bagi pemutusan mahkamah adalah:
F (i) sama ada perayu telah membuat satu notis bertulis bagi pemulangan atau pelepasan wang tersebut dalam tempoh yang ditetapkan oleh s. 128 Akta; dan (ii) sama ada kenyataan bertulis yang direkodkan oleh pegawai kanan kastam cukup sebagai tuntutan bertulis bagi pemulangan wang tersebut.

Diputuskan (membenarkan rayuan)

G **Oleh Nallini Pathmanathan HMR menyampaikan penghakiman mahkamah:**

(1) Di bawah s. 128(1) Akta, di mana barangan telah dirampas tetapi tiada dakwaan yang berbangkit daripada rampasan tersebut dan tiada tuntutan dibuat ke atas barangan tersebut dalam masa satu bulan kalendar,
H barulah barangan tersebut dianggap terlucut hak. Seksyen 128(2) seterusnya memperuntukkan bahawa sebarang tuntutan ke atas barangan tersebut mestilah dibuat secara bertulis oleh orang yang membuat penegasan tersebut, iaitu pemilik barangan tersebut dan bahawa barangan tersebut tidak bertanggungan bagi pelucuthakkan.

I **(2)** Satu tafsiran ketat yang tidak perlu tidak seharusnya diberikan kepada perkataan-perkataan yang dinyatakan dalam s. 128(2) khasnya 'memberi notis bertulis'. Perkataan-perkataan tersebut tidak harus ditafsir dengan

ketat hingga membataskan seksyen tersebut agar bermaksud bahawa ia hanya dipenuhi apabila notis formal atau surat bertulis dikeluarkan oleh perayu kepada Jabatan Kastam dalam tempoh yang dikehendaki iaitu satu bulan. Pembentukan yang diguna pakai oleh Mahkamah Tinggi memerlukan pemasukkan perkataan-perkataan tambahan 'dikeluarkan oleh perayu' selepas perkataan-perkataan 'notis bertulis'. Ini tidak bermaksud pematuhan penuh terhadap seksyen tersebut.

(3) Terdapat pematuhan penuh s. 128(1) dan (2) Akta. Perayu telah menegaskan secara efektif bahawa dia adalah pemilik wang tersebut dan bahawa dia menuntut agar wang tersebut tidak dilucuthakkan. Kenyataan yang direkodkan oleh pegawai kanan kastam yang merampas wang tersebut dibuat secara bertulis. Notis bertulis tersebut diberikan kepada pegawai kawan kastam dalam tempoh satu bulan kalendar seperti yang dinyatakan dalam Akta. Oleh itu, ini memenuhi keperluan yang dinyatakan dalam s. 128(2) Akta.

(4) Oleh kerana terdapat notis tuntutan secara bertulis yang mencukupi oleh perayu kepada pegawai kanan kastam yang relevan, tiada pelucuthakkan automatik atau anggapan pelucuthakkan ke atas wang tersebut. Apabila Jabatan Kastam atau responden-responden menyedari akan tuntutan ke atas wang tersebut dan mereka gagal membuat dakwaan dalam masa satu bulan kalendar, tidak boleh terdapat pelucuthakkan atau anggapan pelucuthakkan. Responden-responden, melalui Ketua Pengarah Kastam, mestilah melepaskan atau merujuk tuntutan tersebut kepada mahkamah.

Case(s) referred to:

Assan Mohamad & Ors v. Hock Huat Chan Sdn Bhd [2013] 9 CLJ 545 CA ***(refd)***

Kwality Ice Cream Company and Restaurant v. The Sales Tax Officer, New Delhi 11 (1975) DLT 180, 1974 34 STC 396 Delhi ***(refd)***

Smith v. East Elloe Rural District Council and Others [1956] 1 All ER 855 ***(refd)***

Soong Chee Kong v. PP & Ng Soon Sum and Anor v. PP [1950] 1 LNS 84 HC ***(refd)***

Suntharaju Pachayappan v. Jabatan Kastam DiRaja Malaysia [2010] 3 CLJ 865 HC ***(refd)***

Legislation referred to:

Anti-Money Laundering and Anti-Terrosim Financing Act 2001, s. 23(1)
Customs Act 1967, ss. 114, 128(1)(a), (b), (c), (2), (3), 133(1)(a), 135(1)(a)
Customs Enactment 1937, s. 108
Federal Constitution, art. 13

For the appellant - Sivanathan (V Yoges with him); M/s Sivanathan
For the respondent - Mazlifah Ayob; SFC

[Editor's note: Appeal from High Court, Shah Alam; Originating Summons No: 24-9118-06-2013 (overrueld).]

Reported by Najib Tamby

A

JUDGMENT

Nallini Pathmanathan JCA:

Introduction

[1] On 4 August 2011, a sum of USD350,000 in cash was seized from the
B appellant, one Mehdi Dadashi Havadaragh ('the appellant'), at the Kuala Lumpur International Airport as he was returning to Iran. These cash monies were subsequently 'automatically' forfeited by the Jabatan Kastam DiRaja ('the Customs Department'), although no prosecution or charge was issued against the appellant. Such forfeiture was not made known to the appellant,
C notwithstanding a series of queries by the appellant through his solicitors over a period of one year and ten months.

[2] Upon expiry of this period, the appellant filed a claim in the High Court, seeking the return of the monies so seized. The respondents resisted the claim maintaining that the appellant had failed to submit a written claim
D for the seized goods in accordance with s. 128 of the Customs Act 1967.

The Decision Of The High Court

[3] The High Court agreed with the respondents and dismissed the appellant's application on 22 October 2013, primarily on the grounds that
E the appellant had failed to submit written notice for the seized monies within a period of one calendar month in accordance with s. 128 of the Customs Act 1967. The appellant appealed against this decision.

The Appeal

F **[4]** This appeal turns on whether the appellant made written notice for the return or release of these cash monies within a period of one calendar month as provided for under s. 128 of the Customs Act 1967 ('the said Act'). This in turn entailed the construction of the forfeiture provisions arising under s. 128 of the said Act. The section envisages that where there is no prosecution with regards to goods seized by the Customs Department, such
G goods are deemed to be taken and forfeited after one calendar month from the date of seizure of the goods, unless a claim to the goods is made. The manner of making the claim is specified in s. 128(1)(a) to (c) and (2) of the said Act.

H **The Decision Of This Court**

[5] At the conclusion of the hearing of the appeal on 17 November 2014, we decided by a majority that the appeal was allowed and that the cash monies were to be released to the appellant. Justice Vernon Ong JCA dissented, affirming the decision of the High Court.

I **[6]** We now provide the grounds for our majority decision in allowing the appeal.

Salient Background Facts

[7] The seizure and subsequent forfeiture of the appellant's monies by the respondents here arose in the following manner. As the appellant was returning to Iran from the Kuala Lumpur International Airport on 4 August 2011 together with his wife and daughter, monies in the sum of USD350,000 (three hundred and fifty thousand dollars) which he was carrying in a briefcase were seized from him. The appellant could not produce any letter from Bank Negara Malaysia authorising him to take that sum of money out of the country. The appellant had, in essence, failed to declare that he was carrying the said sum. He was suspected of committing an offence under s. 135 of the Customs Act 1967 and the Exchange Control Act 1953 for carrying uncustomed goods, namely the monies in his briefcase.

Seizure Of The Sum Of USD350,000

[8] The seizure of the cash monies is recorded and documented by way of a notice of seizure issued by the respondents dated the same day, ie, 4 August 2011. The said notice was signed by the senior customs officer who had effected the seizure. The notice was countersigned by the appellant. It contained a statement to the effect that if the appellant wished to claim the goods he was required to "… give notice accordingly to the undersigned before the expiry of one calendar month from the date of this notice". In short, the appellant was required to give notice to the senior customs officer who had seized the monies that he wished to claim the said monies, on or by 4 September 2011.

Statement In Writing

[9] Immediately after the seizure, the same senior customs officer who had effected the seizure of the cash monies interviewed and recorded a statement in writing from the appellant. In the course of the interview, the appellant explained that the sum of USD350,000 belonged to him and had been meant to be used to purchase a house under the "Malaysia My Second Home" programme. In the course of the interview and as recorded in the statement, he explained why the monies had not been so utilised and his continued intention to participate in the "Malaysia My Second Home" programme upon his return to Malaysia from Iran. The cautioned statement given by the appellant was retained by the same senior customs officer who had effected the seizure and recorded the interview.

Contents Of Statement Given By The Appellant And Recorded In Writing By The Customs Officer On 4 August 2011

[10] It is pertinent to set out here some of the statements made by the appellant to the senior customs officer, which were reduced to writing on 4 August 2011. In explaining his possession of the USD350,000 in cash he stated, *inter alia*, as follows:

> About USD350,000 in my bag, I bring the money from Iran, firstly I bring the money around USD180,000 and second time USD200,000 ...

[11] When asked whether he declared the fact that he had brought such amounts of money into Malaysia he responded:

> No, because I don't know how to declare, nobody ask me to declare.

[12] He explained that he had a business selling stone from Iran to Malaysia which he conducted through a company that had been incorporated on 25 June 2010. He rented a home in Malaysia.

[13] He explained why he was taking the sum of USD350,000 back to Iran as follows:

> I don't buy the home so I want to back to Iran because my passport near to expired and I plan to comeback here after renew the date on the passport. I think the money is not safe so I decided to bring the money to Iran, and then I want to bring the money back to Malaysia, because I want buy the house and factory. I don't know how to keep the money in Malaysia.

[14] He further clarified that he did not possess a personal bank account in Malaysia but that there was a bank account in the name of the company incorporated on 25 June 2010.

[15] After this the appellant and his family were released upon furnishing a sum of RM2,000 by way of security.

Subsequent Events

[16] There was no further communication from the Customs Department to the appellant, *albeit* in relation to the monies seized, or in relation to whether any charge would be preferred against the appellant. The appellant therefore on 28 October 2011, appointed solicitors to liaise with the Customs Department on his behalf. Written enquiries were made by the appellant's solicitors over a period of approximately one year and ten months, commencing from 28 October 2011, during which time further interviews were conducted with the appellant's wife and one other person, namely the estate agent handling the appellant's file in the 'Malaysia My Second Home' programme. Four different investigating officers took charge of this matter during this time. At all times the appellant was advised that the matter was under consideration by the Customs Department and that no final decision had been made. At no time was the appellant advised that the cash monies in the entire sum of USD350,000 had been forfeited by the Customs. After a period of one year and ten months, with no decision forthcoming and with no information about his cash monies, the appellant filed an application for the release of his cash monies in the sum of USD350,000.

Appellant's Application To Court For Recovery Of Monies Seized

[17] It was only after the filing of the application for such recovery that the appellant was advised by the respondents in this action that his cash monies in the sum of USD350,000 had been '*taken and deemed forfeited*' under s. 128(1) of the said Act. The respondents maintained that the monies had

been so forfeited because the appellant had failed to make a written claim for the monies as expressly set out in s. 128 of the said Act. The respondents further decided, but only one week after the appellant had filed his application in court, that they intended to charge the appellant under s. 135(1)(a) of the Customs Act 1967 and s. 23(1) of the Anti-Money Laundering Act and Anti-Terrosim Financing Act 2001.

[18] The appellant on the other hand maintained that he had in effect made the requisite claim for a return of his cash monies to the senior customs officer who had effected the seizure of his monies, by virtue of the written interview conducted with the said officer on the very day of seizure, ie, 4 August 2011.

Decision Of The High Court

[19] In the court below the learned judge dismissed the appellant's application for a return of the seized cash monies chiefly on the ground, as contended by the respondents, that the appellant had failed to comply with the provisions of s. 128(2) of the Customs Act 1967, in that he had failed to serve written notice for the seized goods or cash monies belonging to him. The learned judge held that he could not find a single document showing that the appellant had served "a written claim" on the respondents.

[20] Additionally, the learned judge held in relation to the statement given by the appellant to the senior customs officer that a copy of such statement ought to have been procured from the respondents. The learned judge held that the appellant had not procured the statement.

[21] The learned judge also relied on the statement by the respondents that they intended to charge the appellant under the Customs Act and the Anti-Money Laundering Act, and as such, the cash monies of USD350,000 would comprise an exhibit in the said case and could not be returned to the appellant.

[22] Finally the learned judge also queried the need to remove the cash monies of USD350,000 from Malaysia, if in fact such monies were meant to be utilised for the purposes of purchasing a home in Malaysia. He was of the view that the monies ought to have been banked in an account in Malaysia.

[23] It is against this decision of the High Court dismissing the appellant's application for a return of the seized monies that the present appeal was brought.

The Hearing Before The Court Of Appeal

Submissions On Behalf Of The Appellant

[24] The submissions of learned counsel for the appellant, Dato' N Sivananthan may be summarised in the following manner:

(i) It was contended, contrary to the finding of the learned High Court Judge, that although there was no specific notice in writing issued by the appellant to the respondents for the recovery of the seized monies, the

A appellant had in fact effectively made his claim for such recovery in the course of the interview when his statement was taken in writing by the senior customs officer who had seized the monies. In short, the appellant submitted that notice of ownership of the cash monies and his claim for those monies had been made as of 4 August 2011, which was within the B period of one calendar month stipulated under s. 128 of the Customs Act 1967;

(ii) Learned counsel further submitted that the appellant's recorded statement was produced by the respondents, upon the request of the appellant, in the High Court, prior to the hearing of the appellant's C application for a release of the monies. A copy of the written statement was tendered to the court for perusal. Given the availability of the statement at that juncture, it was submitted that the learned judge had erred factually in concluding that the appellant had not procured a copy of the statement from the respondents. Consequently it was contended D that the learned judge had not fully appreciated the entirety of the evidence presented, in that he had concluded erroneously that there was no document to support the appellant's plea that he had in fact made claim for the subject monies as required under s. 128(2) of the Customs Act 1967;

E (iii) It was also argued that the learned judge had erred in taking into consideration the respondents' bare averment in their affidavits that the appellant faced the risk of being charged under the Customs Act and the Anti-Money Laundering Act for failing to make a declaration with regard to the seized monies, as any intended prosecution by the F respondents against the appellant had no bearing to the application before the learned judge. Moreover such averment was not supported by any documentary evidence in the form of a proposed or intended charge against the appellant. In this context it was pointed out that the appellant has not been charged in court under either the Customs Act 1967 or the G Anti-Money Laundering Act; and

(iv) With regards to the respondents' intimation that they intended to charge the appellant, it was submitted that such intimation was only made known after the filing of the appellant's application for a release of the monies, and more than one year and ten months after the seizure of the H appellant's monies. As such it was submitted that the decision to charge was tainted and *mala fide*, orchestrated primarily to meet and rebut the appellant's claim for release of the monies. Learned counsel also argued that the learned High Court Judge had erred in taking into consideration the proposed intention to charge the appellant, when it was evident that I the decision was very much an afterthought.

Submissions On Behalf Of The Respondents

[25] For the respondents, Senior Federal Counsel Puan Mazlifah Ayob submitted that the cash monies of USD350,000 seized from the appellant had been automatically forfeited in accordance with s. 128 of the Customs Act, as no written claim was made by the appellant within the one month period stipulated. Article 13 of the Federal Constitution, it was argued, allowed for a person to be deprived of property in accordance with the law. As the monies had been automatically and validly forfeited in accordance with s. 128 of the Customs Act 1967, it was contended that the appellant could not procure a return of the subject monies.

[26] In support of this submission, reliance was placed on the decision of this court in *Assan Mohamad & Ors v. Hock Huat Chan Sdn Bhd* [2013] 9 CLJ 545; [2013] 5 MLJ 76. In that case the Customs Department seized 21 containers of imported rice belonging to the plaintiff on four different occasions, on suspicion of the commission of an offence under s. 133(1)(a) of the Customs Act 1967. A notice of seizure was issued to the plaintiff's agent in respect of the first seizure but not in respect of the rest of the seizures because the plaintiff's agent was present. Subsequently no prosecution was initiated by the Customs Department in respect of the containers of rice that had been seized. It is undisputed that no claim was made in relation to the seized goods by the plaintiff. The Customs Department forfeited the rice and sold it to BERNAS pursuant to s. 128. The plaintiff subsequently sought a declaration that the seizures were unlawful in that it had not been accorded an opportunity of being heard. This court reversed the decision of the High Court, holding that the seizures were lawful as there had been compliance by the Customs Department with s. 128(1)(a) and (2) of the Customs Act 1967. It was held *inter alia* as follows:

> In the present case, it is not disputed that the owner of the goods, that is to say, the respondent did not make any claim to the seized goods within the prescribed one month period, the period stipulated by s. 128(1)(a) and (2) of the Customs Act. In such a situation the Customs Act provides for automatic forfeitures. The Customs Act provides that the seized goods 'shall be taken and deemed to be forfeited at the expiration of one calendar month'. There is nothing else for the Customs Department to do except to treat the goods as forfeited goods, and to deal with them accordingly.

[27] Senior Federal Counsel relied on the judgment of the court to submit that in like manner in the instant case the appellant had failed to deliver a claim by way of a written notice to the Customs Department expressly asserting that:

(i) He is the owner of the seized monies;

(ii) That the monies are not liable for forfeiture; and

(iii) He makes claim for the return of the monies.

[28] In reply to the appellant's contention that such a claim had in fact been made through the written statement recorded from the appellant during the course of the interview, it was submitted that the statement fell short of the requirements for a formal written notice of claim as stated in s. 128 of the said Act.

[29] Learned Senior Federal Counsel further submitted that not only had the appellant failed to deliver a claim in writing, but had also failed to do so within the strict time line stipulated in s. 128, namely one calendar month. (see *Sunthararaju Pachayappan v. Jabatan Kastam DiRaja Malaysia* [2010] 3 CLJ 865).

[30] In these circumstances, the respondents maintained that the learned judge had correctly held that the appellant had failed to prove the existence of a written notice of claim made to the respondents within the stipulated period of one calendar month.

Grounds

[31] In our majority judgment the appeal should be allowed. The primary question or issue before us was whether the written statement recorded by the senior customs officer on 4 August 2011:

(i) Sufficed as a written claim for the return of the goods/monies; or

(ii) Did not, and could not, amount to a claim for the return or release of the seized goods or monies.

[32] Underlying this question was the construction to be accorded to the forfeiture provisions under the Customs Act as contained in s. 128, namely whether a literal or purposive approach should be adopted, bearing in mind the rationale or philosophy behind the doctrine of forfeiture as prescribed by the statute.

[33] It is pertinent at this juncture to set out the provisions of s. 128 in full:

> 128. Goods seized in respect of which there is no prosecution, or the proceeds of sale thereof, are forfeited if not claimed within one month
>
> (1) If there be no prosecution with regard to any goods seized under this Act, such goods or the proceeds of sale of such goods which are held pursuant to paragraph 115(1)(c) shall be taken and deemed to be forfeited at the expiration of one calendar month from the date of seizure of the goods unless, before such expiration:
>
> (a) a claim to such goods or the proceeds of sale of such goods is made under subsection (2);
>
> (b) a written application is made for the return of such goods under paragraph 115(1)(a) or (b); or
>
> (c) such goods are returned under the said paragraph (a) or (b).

(2) Any person asserting that he is the owner of such goods or the proceeds of sale of such goods, as the case may be, and that they are not liable to forfeiture may give written notice to a senior officer of customs that he claims the same.

(3) On the expiration of the period mentioned in subsection (1), or, if a decision is made earlier that there be no prosecution with regard to the goods, on the making of the decision the senior officer of customs shall, if such goods or the proceeds of sale of such goods are not taken and deemed to be forfeited under that subsection, refer the claim to the Director General who may direct that such goods or the proceeds of sale of such goods or the security furnished under paragraph 115(1)(a) or (b), as the case may be, be released, or may direct such senior officer of customs, by information in the prescribed form, to refer the matter to a Magistrate of the First Class for his decision.

(4) The Magistrate of the First Class shall issue a summons requiring the person asserting that he is the owner of the goods or the proceeds of sale of such goods, and the person from whom the goods were seized, to appear before him, and upon their appearance or default to appear, due service of such summons being proved, the Magistrate of the First Class shall proceed to the examination of the matter, and upon proof that an offence against this Act or any regulations made thereunder has been committed and that such goods were the subject matter, or were used in the commission, of such offence, shall order such goods or the proceeds of sale of such goods or the amount secured under paragraph 115(1)(a) or (b), as the case may be, to be forfeited, or in the absence of such proof, may order the release of such goods or the proceeds of sale of such goods or the security furnished under paragraph 115(1)(a) or (b), as the case may be.

(5) In any proceedings under subsection (4), section 119 shall apply to the person asserting that he is the owner of the goods and to the person from whom they were seized as if such owner or person had been the defendant in a prosecution under this Act. (emphasis added)

[34] It is evident from a perusal of s. 128(1) that when any goods are seized, but there is no prosecution arising from such seizure and there is no claim made in respect of those goods within one calendar month, then and only then are the goods 'deemed to be forfeited'. The section therefore envisages the twin requirements of both an absence of prosecution coupled with no claim whatsoever being made in respect of the goods.

[35] Section 128(1) goes on to specify in limbs (a) and (b) how such a claim to the goods is to be made. Limb (a), which is relevant in the present case, makes reference in turn to sub-s. (2). Section 128(2) envisages that any claim to such goods is to be made in writing by a person who makes the following assertions, namely that he is the owner of the goods, and that the goods are not liable to forfeiture.

[36] The question that arises for adjudication is whether, in the context of the factual matrix of the instant case, the appellant did, or did not make a 'claim' which fell within the purview of s. 128(1)(a) read together with

A s. 128(2). The factual matrix here shows that a statement in writing was procured from the appellant by the very same customs officer who had seized the goods. Moreover his statement was taken immediately after such seizure. The salient portions of the recorded statement have been highlighted at the outset of this judgment. Of importance and significance are the statements of
B the appellant to the customs officer that:

(i) He had brought the monies totalling USD350,000 personally from Iran. It follows from this statement, particularly in the context of the entirety of the interview, that the appellant was effectively asserting that the monies belonged to him, or that he was the owner of the sum of
C USD350,000. That is a reasonable inference to be drawn from the appellant's statement; and

(ii) He was taking the monies back to his home country, Iran because he was not assured of the safety of leaving the monies in Malaysia. However, he wanted to bring the monies back to purchase property in Malaysia.
D It is evident from this statement that he had made known to the customs officer that he required the monies for his own use to purchase property, and did not want the monies to be forfeited.

[37] It therefore follows that a plain and constructive interpretation or
E analysis of the appellant's statements discloses that he did in fact effectively assert that he was the owner of the seized USD350,000, and that he is making claim for the monies such that it ought not to be forfeited.

[38] The statement recorded by the customs officer who seized the monies is in writing. This therefore satisfied the requirement of 'written notice to a
F senior officer of customs that he claims the same' as set out in sub-s. 128(2).

[39] This written notice was accorded to the customs officer within the one calendar month period stipulated under the Act. In point of fact the notice of seizure requires that the appellant give notice to the customs officer who had seized the goods. This was clearly done by the appellant in the course
G of his interview as may be gleaned from a perusal of the recorded statement.

[40] Given the evidence of the clear pleas and statements of the appellant which were reduced to writing in the interview conducted on 4 August 2011, it would be difficult to maintain that the customs officer who seized the goods (and hence the respondents) had absolutely no notice or knowledge of the
H appellant's claim to the seized monies.

[41] In so concluding we are of the view that an unnecessarily restrictive interpretation ought not to be accorded to the words specified in s. 128(2), namely "give written notice". The words are not to be construed so narrowly as to confine the section to mean that it is only satisfied when a formal notice
I or letter in writing is issued by the appellant to the Customs Department, within the requisite period of one month. Put another way, the construction afforded by the High Court appears to suggest that s. 128(2) of the said Act

means that the appellant is required to "personally give or issue a written notice prepared by himself". Such an interpretation does not accord with either a literal or purposive reading of s. 128(2). It is in fact the antithesis of both these approaches, in that it adopts a hyperliteral brand of construction or textualism. This is an interpretation that would severely narrow the scope and application of s. 128(2) of the said Act.

[42] In support of our conclusion, reference is made to two authorities.

[43] In the House of Lords case of *Smith v. East Elloe Rural District Council and Others* [1956] 1 All ER 855, an issue arose as to whether the compulsory purchase order that was the subject matter of the appeal could be questioned in legal proceedings, as para. 16, part 4, sch. 1 of the Acquisition of Land (Authorisation Procedure) Act 1946 provided that a compulsory purchase order under part 3, sch. 1 shall not be questioned in legal proceedings. The appellant's counsel submitted that the words "made in good faith" should be added when reading the words "compulsory purchase order". Declining to accept that argument, Viscount Simonds held as follows:

> But it is our plain duty to give the words of an Act their proper meaning and, for my part, I find it quite impossible to qualify the words of the paragraph in the manner suggested. … There is nothing ambiguous about para 16; there is no alternative construction that can be given to it; there is, in fact, no justification for the introduction of limiting words such as "if made in good faith", and there is the less reason for doing so when those words would have the effect of depriving the express words "in any legal proceedings whatsoever" of their full meaning and content.

[44] In like manner in the instant case the words 'written notice' ought to be given their full meaning to denote 'knowledge in writing of a claim to the monies by the appellant' rather than be restricted to 'a written notice issued by the appellant himself to the respondent'. In short, in our view the construction adopted by the High Court would require the introduction of the additional words 'issued by the appellant' after the words 'written notice'. This would not, in our respectful view, give full accord to the section.

[45] And in *Kwality Ice Cream Company and Restaurant v. The Sales Tax Officer, New Delhi* [11 (1975) DLT 180, 1974 34 STC 396 Delhi], a decision of the High Court in New Delhi, PN Khanna J in determining that ice cream was a milk product that was entitled to tax exemption, stated as follows:

> I may however, add that when the words in a statutory provision are clear and involve no ambiguity, as is the present case, they have to be given their full and natural meaning. They do not call for any elaborate interpretation. … **Generally speaking, words and expressions would be given their plain and ordinary meaning, which cannot be cut down or curtailed unless they in themselves are clearly restrictive.** (emphasis added)

[46] Therefore, taking the two persuasive authorities together, where words in a statutory provision have a plain and ordinary meaning, the court should not read additional words into the statute to curtail or narrow down the meaning of the words. The words "give written notice" are plain and clear. They do not require any elaborate interpretation. Neither should those words be unduly restricted.

[47] We therefore, with respect, disagree with the views of the learned High Court Judge on his finding that there was no claim made in respect of the seized monies within the stipulated period. We are of the view, for the reasons stated above, that there was substantive compliance with s. 128(1)(a) and (2) of the said Act. The learned judge did not consider the effect of the contents of the statement procured by the customs officer on the very day of seizure, having erroneously concluded that the statement had not been procured by the appellant. As such we concluded that the written statement recorded by the senior customs officer on 4 August 2011 sufficed as a written claim for the return of the monies.

The Consequence Of An Effective Claim Made Under s. 128(1)(A) And (2) Of The Said Act

[48] Having concluded that there was sufficient notice of a claim in writing by the appellant to the relevant customs officer, it follows that no automatic or 'deeming' forfeiture of the monies would follow. Automatic or 'deemed' forfeiture only occurs under s. 128 of the said Act where there is no prosecution and no claim made for the goods. In the instant case, at all material times when the appellant's application was filed in court, there was no prosecution and an effective claim within s. 128(1)(a) of the said Act for the seized monies had been made.

[49] The rationale or underlying purpose of these forfeiture provisions was considered in the case of *Soong Chee Kong v. PP & Ng Soon Sum and Anor v. PP* [1950] 1 LNS 84; [1951] 17 MLJ 5 ('*Soong Chee Kong*'s case'). Taylor J considered the effects of s. 108 of the then Customs Enactment 1937 which is an earlier predecessor of the present provisions and bears substantial similarity to the present provisions. In *Soong Chee Kong*'s case s. 108 was construed as follows:

> Section 108 provides that when any goods are seized, notice shall forthwith be given to the owner, unless he or his agent knows about it already. If there is no prosecution, or if there is a prosecution but the Magistrate does not forfeit, and if the goods are not claimed within one month, then they are forfeited automatically by operation of law. This section is not as clear as some others and has been misunderstood. The words "if there is no prosecution" mean if no prosecution relevant to the goods is commenced. ...

> ... Where a claim is made it must first be considered by the Comptroller who may release the goods but cannot forfeit them. This covers cases of seizure on suspicion where circumstances are afterwards explained to the satisfaction of the Comptroller. If he does not release, he must refer the matter to Court.

[50] Further on in the judgment the effect of s. 108, which is similar to the present 128, was considered:

> Section 108 deals with all goods which have been seized but not forfeited by a Court. It expressly includes cases where there was a prosecution but no forfeiture and cases where there was no prosecution. If such goods are not released by the Comptroller, the matter must be litigated. ...
>
> ... In general forfeiture follows proof of an offence; it is associated with a fine and must be considered on the same principles. It must not be ruinous; it must be proportionate both to the offence and to the means of the accused; some regard must also be paid to the need for deterrents and protection of the public revenue.

In concluding Taylor J held as follows:

> *The doctrine that although goods can be lawfully seized on mere suspicion, they must be forfeited even though no offence in fact occurred, and that release can be granted only by the High Commissioner, if seriously applied, would soon lead to unendurable congestion ...* (emphasis added)

[51] The foregoing construction is borne out by a perusal of s. 128(1), (2) and (3) of the said Act. Taken in totality, the sections prescribe that upon seizure of goods on suspicion by the Customs Department (as they are lawfully entitled to do under s. 114 of the said Act), the Customs Department have a period of one calendar month within which to initiate a prosecution in respect of the seized goods. At the end of the calendar month if there is no prosecution, and no one makes any claim whatsoever for the goods, the goods are deemed forfeited. But if at the end of one calendar month there is no prosecution but there is a claim for the goods, the respondents are bound to refer the claim to the Director-General who may then direct that the monies be released, or that the matter be referred to a Magistrate of the First Class to carry out an investigation or hearing as to whether the goods ought to be forfeited or returned to the owner. Where the Magistrate finds that the goods were the subject matter of, or were used in the commission of an offence, he has no discretion but must order the goods to be forfeited. However where there is no such proof, the goods are to be released. In short, where the Customs Department or the respondents are aware of a claim to the monies and they have failed to initiate a prosecution within one calendar month, there can be no forfeiture or deemed forfeiture. The respondents, through the Director-General of Customs, must release or refer the claim to court.

A **[52]** It follows from the foregoing that as we have concluded that the appellant did make a claim within the purview of s. 128(1)(a) and (2) of the said Act, the respondents were bound to refer the matter to the Director-General of Customs, who in turn had to either release the goods or refer the matter to court. That would then have enabled the appellant to be heard in
B full in relation to his claim for the seized monies. This unfortunately did not transpire. There was a failure to comply with s. 128(3) on the erroneous conclusion that there was no 'claim' made by the appellant within the purview of s. 128(1). The consequence is that there was a failure to comply with s. 128(3), thereby denying the appellant an opportunity of being heard
C in accordance with those provisions. Instead the respondents were unable to determine whether or not to initiate a prosecution or charge the appellant for more than one year and ten months, on what appears to be a relatively straightforward matter. This too, notwithstanding that they took statements corroborating the appellant's version of events from two other persons.

D **[53]** In all these circumstances it is evident that the 'deemed' forfeiture of the seized monies belonging to the appellant by the respondents was misconceived and erroneous. There was no basis for the deemed or automatic forfeiture, in light of the express claim made by the appellant on the very day of the seizure of the monies, directly to the senior customs
E officer who had effected such seizure. This was sufficient notice of a claim to the monies as envisaged under s. 128(1)(a) and (2) of the said Act. For these reasons the appeal was allowed with costs.

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